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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
LEWIS E. BROWN.

LEWIS E. BROWN, APPELLANT,
v.
THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.
GEORGE B. DAVIS,
Judge-Advocate-General.
FRANKLIN W. COLLINS,
Special Attorney.

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THE UNITED STATES, APPELLANT, v. LEWIS E. BROWN. } No. 283.

LEWIS E. BROWN, APPELLANT, v. THE UNITED STATES. } No. 284.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

I.

STATEMENT OF FACTS.

The above-mentioned Lewis E. Brown (who hereinafter will be referred to as the appellee) was, on the 7th day of July, 1898, duly appointed and commissioned first lieutenant of the Ninth Regiment Volunteer Infantry, in the service of the United States.

On November 11, 1898, he was tried by general court-martial, convened by order of Brigadier-General Wood, at San Luis, Cuba, upon the charge of "conduct unbecoming an officer and a gentleman"

in violation of the sixty-first article of war, the specification reciting that he had gambled with enlisted men of Company I, Ninth United States Volunteer Infantry, at camp near San Luis, Cuba, on or about the 11th day of October, 1898, and on said first-mentioned day he was by said court found not guilty of the charge and not guilty of the specification, and he was acquitted. Thereupon the court adjourned sine die. The record was thereupon transmitted to General Wood, and on December 6, 1898, was returned by him to the court for reconsideration, and on December 6, 1898, the court reconsidered its former findings and found the appellee guilty of the charge and of the specification, and sentenced him to be dismissed from the service. On December 24, 1898, the proceedings, findings, and sentence were approved by General Wood, and the record was duly forwarded for the action of the President; on January 12, 1899, the record was returned to General Wood and his attention challenged to the fact that the one hundred and sixth article of war, requiring the approval of the President, relates to time of peace and that the state of war still continued; on February 15, 1899, the sentence was ordered by the commanding officer to take effect on February 17, 1899, on which last-mentioned date the appellee would cease to be an officer of the Volunteer Army of the United States.

It further appears that the regiment to which appellee had been attached as an officer was mustered out by order of the President on the 25th day of May, 1899.

Upon the foregoing facts the Court of Claims decided, as a conclusion of law, that appellee was entitled to recover from the United States judgment for pay from February 18, 1899, up to the time of the final muster out of his regiment, or May 25, 1899, both inclusive, amounting to $404.12.

Subsequently the case was reargued and resubmitted to the Court of Claims on petitioner's motion to amend the findings of the court and for a new trial, and the Court of Claims allowed the petitioner's motion for a new trial and ordered the judgment theretofore rendered to be vacated and set aside and the findings of fact withdrawn and that new findings of fact and conclusions of law be filed, and increased the former judgment from $404.12 to $658.33, which last judgment included the allowance of two month's extra pay under the act of January 12, 1899.

II.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the United States and in favor of the appellee upon the findings of fact.

III.

THE APPELLEE'S CONTENTIONS.

Briefly summarized, are as follows:

First. That one of the members of said court-martial, and its presiding officer, was then an officer of the Regular Army, and his presence, therefore, as

a member of said court was in violation of the provisions of the seventy-seventh article of war.

Second. The court in the first instance having found the appellee not guilty, both upon the specification and the charge, the later action of said court and reconsideration of the case was illegal and void and contrary to the fifth amendment to the Constitution and also of the one hundred and second article of war.

Third. That the court was reconvened under an order of the commanding officer, which failed to comply with the provisions of paragraph 957 of the Army Regulations of 1895, then in force.

Fourth. That although the commanding officer approved the sentence of dismissal and ordered it to be carried into execution, it has never been approved by the President of the United States.

In the cross appeal filed by Brown the following contentions are also made.

Fifth. That the Court of Claims erred in finding as a fact that the entire regiment was mustered out May 25, 1899; also in finding as a fact that the appellee was then mustered out with the regiment. (Finding VII, Rec., p. 9.)

Sixth. That if the appellee was on May 25, 1899, in fact or constructively mustered out or discharged from the service, the Court of Claims erred in excluding the *three* months' extra pay to which it is claimed he is entitled under the act of January 12, 1899, *supra*. (30 Stat. L., 784).

IV.

ARGUMENT.

(First point.)

WAS THE COURT-MARTIAL LEGALLY CONSTITUTED?

Attack has been made upon the jurisdiction of the court-martial, for the reason that the appellee, a first lieutenant in the volunteer service of the United States, was in November, 1898, tried by a general court-martial consisting of five members (the minimum number), of whom one had the rank of second lieutenant in the Regular Army, while serving as a volunteer officer under the rank of lieutenant-colonel, to which he had been regularly commissioned and assigned to the Second United States Volunteer Infantry; the appellee insisting that this was in violation of the seventy-seventh article of war.

The seventy-seventh article of war reads as follows:

> Officers of the Regular Army shall not be competent to sit on courts-martial to try officers or soldiers of other forces, except as provided in article 78.

(Article 78 qualifies officers of the Marine Corps, detached for service with the Army by order of the President, for service with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army or the forces of the Marine Corps so detached.)

The appellee's contention is believed to be without merit, for the reason that while it is true that Lieutenant-Colonel Grubbs, a member of the court-martial which tried the appellee and who presided over its deliberations, was at said time in a sense an officer of the Regular Army; yet at the same time he was only nominally such, for the reason that he was detached therefrom upon an indefinite leave of absence, and was, in fact, at said time a duly commissioned officer in the Volunteer Army of the United States and serving as such and so described in the order convening the court. (Rec., p. 7.)

He was as much an officer of the volunteer forces at that time as if he had theretofore been discharged from the Regular Army and had enlisted anew in the Volunteer Army, or as if he had never in fact been connected with the Regular Army. In the nature of things, he could not serve in both armies at the same time, and it was only by suspending his active connection with the Regular Army and joining and becoming an integral part of the volunteer forces that he could serve with the latter and draw his salary as such. In other words, he could not be an officer in both armies at the same time (at least actively), and his active connection with the Army at said time was with the volunteer forces and not with the Regular Army, and hence the contention of the appellee must fail.

The case of *McClaughry* v. *Deming* (113 Fed. Rep., 639; 186 U. S., 49), and relied upon by the appellee

with confidence, is not apposite. Deming, who was an officer in the Volunteer Army of the United States, was tried by a court-martial *composed entirely of officers of the Regular Army*. In that case it was neither contended nor shown that any member of said court was in any way connected with the Volunteer Army.

The status of its members, therefore, was entirely different from that of the status of the members of this court, all of whom held commissions in the volunteer service and only one of whom, Lieutenant-Colonel Grubbs, had any connection, however remote, with the Regular Army. The decision of the court in the *Deming case* (*supra*), holding that the court-martial was illegally constituted, is therefore without force of application to the case at bar.

While it is true that in the opinion of the court in the case cited, delivered by Mr. Justice Peckham, it was held that:

> There has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can readily be seen that there might naturally be apt to exist a feeling among the militia that they would not be as likely to receive what they would think to be as fair treatment from regulars as from members of their own force. * * *

> It is most probable that Congress recognized all these reasons in its earliest legislation upon the subject as considerations upon which that legislation was founded (p. 56),

yet it is submitted that the above reasoning will not apply to the case at bar, for the reason that the regular in this case had become the volunteer and, it must be believed, had parted with the "reserve" of which the court speaks in the case cited; and, moreover, it would seem that the objections raised in the minds of the militia or volunteers to being tried by regulars would be dissipated in cases where a regular officer united his fortunes with the forces of the volunteers.

This distinction is clearly drawn and recognized by military law writers.

Thus Benét, in his Military Law and Court-Martial (sixth ed., 1868, p. 25), says:

> A court composed of regular officers can not try a volunteer officer, although a regular officer may be tried by a court of volunteers. *Regular officers detailed and sitting as officers of a higher court may try volunteers, but only when holding commissions in the volunteer service*, and a mixed court, composed of regular and volunteer officers, would have authority to try regular officers only. This is unjust to the officers of the regular service, and the Articles of War should be so modified as to place them on a footing with officers of volunteers.

Benét was regarded as authority during the period of the civil war particularly, and his treatise was the text-book of all military trials.

A REVIEW OF THE LEGISLATION RELATIVE TO MILITARY TRIALS, AND ITS INTERPRETATION BY THE DEPARTMENT CHARGED WITH THE ADMINISTRATION AND EXECUTION OF THE LAWS RELATING THERETO, IS CONVINCING OF THE VALIDITY OF THE SENTENCE OF THE COURT-MARTIAL IN CONTROVERSY.

The amenability of officers and enlisted men to military jurisdiction and the eligibility of officers for detail as members of courts-martial result from the military status which is created in their behalf by several enactments of Congress, which prescribe the form, manner, and conditions of their appointment or enlistment. This amenability is fully set forth in the Articles of War, a set of statutory regulations enacted by Congress in virtue of authority "to raise and support armies" and "to make rules for the government and regulation of the land and naval forces," which is vested in the legislative department of the Government by the Constitution.

The legislative status of the Articles of War during the first seventeen years of our constitutional history was in some respects unique. The articles adopted by the several resolutions of the Continental Congress, and which were in force during the war of the Revolution, should have ceased to have obligatory force when the Government under the Articles of Confederation ceased to exist. As a matter of fact, however, they were continued in force by the act of September 29, 1789, entitled "An act to recognize and adapt to the Constitution of the United States the establishment of the troops raised under the

resolves of the United States in Congress assembled, and for other purposes." The enactment provides:

> That the said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war as may hereafter by law be established. (Sec. 4, act of Sept. 29, 1789; 1 Stat. L., 95.)

By the act of April 10, 1806, the Articles of War of 1776 and 1786, which had been in force in the Revolutionary armies, were reenacted with certain modifications and additions, and as so reenacted remained in force until 1878, when they were for the last time revised and embodied in the general revision of the laws as section 1342 of the Revised Statutes.

The articles, in their original English form, contained no exceptions in their application to militia or other troops constituting the royal military establishment, as no military forces, save the standing army, were embodied, for any considerable length of time, from the close of the Parliamentary wars until the great war with France in the middle of the eighteenth century. In their application in the United States, however, as several descriptions of force were employed in the continental armies, provision was made for the composition of courts in the following article:

> The officers and soldiers of any troops, whether minutemen, militia, or others, being mustered and in continental pay, shall, at all

> times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.
>
> That such militia and minutemen as are now in service and have, by particular contract with the respective States, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war. (Sec. XVII, Art. 1, Res. of Cong., Sept. 20, 1776.)

In the code of 1806 the composition of courts-martial was regulated by the ninety-seventh article, which provided that—

> The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers. (Act of Apr. 10, 1806; 2 Stat. L., 371.)

The last clause of the article above cited was a reenactment of section 6 of the general militia law

of February 28, 1795, which contained the requirement that—

> Courts-martial for the trial of militia shall be composed of militia officers only. (Act of Feb. 28, 1795; 1 Stat. L., 424.)

If the ninety-seventh article of the code of 1808 be compared with the corresponding provisions of the code for the government of the continental armies it will be seen that the separate jurisdiction which was created in behalf of the colonial levies in the articles of 1776 and 1786 was no longer provided for. This was due to the fact that the Constitution provided for two classes of military force, and no more; these were (1) the force raised by Congress in pursuance of its power "to raise and support armies" and (2) the militia, a force provided for in the clauses of the Constitution which vest power in Congress—

> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. (Constitution, Article I, sec. 8, par. 14.)
>
> To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. (Ibid., par. 15.)

It has been seen that article 97 of the code of 1806 continued in force until 1878, when it was replaced

in the revision of the laws by the sixty-fourth, seventy-seventh, and seventy-eighth articles of war (1342 R. S.), which have already been made the subject of judicial interpretation by this court. (*McClaughry* v. *Deming*, 186 U. S., 49.)

> ART. 64. The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial. (Sixty-fourth article of war.)
>
> ART. 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78. (Seventy-seventh *ibid.*)
>
> ART. 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps who may be present and duly authorized shall be obeyed. (Seventy-eighth *ibid.*)

The forces raised directly by the Government of the United States have, since 1789, been composed of regular troops and volunteers, the chief difference between them being the length of the contractual engagement of the enlisted men and the tenure of office of the commissioned officers. This distinction

is fully set forth in the following opinion of the Judge-Advocate-General:

> The volunteer force during the civil war was not a part of the militia, but of the Army of the United States. Though assimilated to the militia in some respects, as, for example, in the mode of original appointment of regimental and company officers, it was as distinct *in law* from the militia as was the so-called "regular" contingent of the Army. Volunteer officers, once mustered into the service of the United States, and while they remained in that service, did not differ substantially from regular officers in their status, rights, or otherwise. Their tenure of office was, indeed, briefer; this, however, was not a material legal distinction, since the term of regular officers was also in some cases limited by statute to a definite period—as the duration of the existing war. (Par. 2444, Dig. of Opin. J. A. Gen.)

Although volunteer forces, in the present understanding of that term, were first employed in active military operations during the war with Mexico, there is statutory support for the view that it was contemplated by Congress to employ them at an earlier period. The act of May 28, 1798, passed in contemplation of the war with France, contained the requirement that—

> In addition to the aforesaid number of troops the President is hereby empowered, at any time within three years after the passing of this act, if, in his opinion, the public interest

> shall require, to accept of any company or companies of volunteers, either of artillery, cavalry, or infantry, who may associate and offer themselves for the service; who shall be armed, clothed, and equipped at their own expense, and whose commissioned officers the President is hereby authorized to appoint; who shall be liable to be called upon to do military duty, at any time the President shall judge proper, within two years after he shall accept the same; and when called into actual service, and while remaining in the same, shall be under the same rules and regulations and shall be entitled to the same pay, rations, forage, and emoluments of every kind, excepting bounty and clothing, as the other troops to be raised by this act. (Sec. 3, act of May 28, 1798; 1 Stat. L., 558.)

In the foregoing enactment it will be noted that the volunteer forces which were authorized to be raised, "when called into actual service and while remaining in the same," were to be "under the same rules and regulations * * * as the other troops to be raised by this act." By a subsequent enactment it was provided that—

> The companies of volunteers and the members of each company * * * shall submit to and observe such rules of training and discipline as shall be thought necessary to prepare them for actual service; and which rules the President of the United States is hereby authorized to make and establish. (Act of June 22, 1798, 1 Stat. L., 569.)

In 1807 and 1812 authority was again conferred upon the President to raise a force of volunteers, and it was provided that—

> When called into actual service, and whilst remaining therein, shall be under the same rules and regulations and be entitled to the same pay, rations, forage, and emoluments of every kind, bounty and clothing excepted, with the regular troops of the United States. (Sec. 2, act of Feb. 24, 1807, 2 Stat. L., 419; act of Jan. 2, 1812, 2 Stat. L., 670; act of Feb. 6, 1812, 2 Stat. L., 676; act of July 1, 1812, 2 Stat. L., 774.)

As the records of the War Department were destroyed during the occupation of the city of Washington by the enemy in 1814, but few records of trial by courts-martial prior to that date have been preserved, so that it is impossible to ascertain from such records of trial the exact composition of the courts convened for the trial of members of the military establishment; nor is it possible to ascertain with exactness what volunteer organizations, if any, were raised for the prosecution of the war with England in 1812 to 1815. So far as the records of the Department are concerned, the conclusion is warranted that the troops employed in the war of 1812 were composed of regulars and militia only.

The next occasion for the employment of volunteers arose in 1846, when, in the act recognizing the existence of the war with Mexico, authority was given for the organization of 50,000 volunteers; the act provided that—

> said volunteers shall, when called into actual service and while remaining therein, be subject to the rules and articles of war, and shall be in all respects, except as to clothing and pay, placed on the same footing with similar corps of the United States Army. (Sec. 4, act of May 13, 1846, 9 Stat. L., 9; secs. 3 to 5, act of March 3, 1847, 9 Stat. L., 184.)

The practice of forwarding records of trial by general courts-martial to the War Department, from commands engaged in active operations in the field, was not well established during the Mexican war; partly for that reason, partly because of the infrequency and uncertainty of mail communication, and partly for the reason that the forces engaged in the operations conducted by Generals Taylor and Scott were actively employed in the field, but few records of trial found their way to the War Department.

The records of courts-martial which are filed in the War Department, however, indicate that, in one case at least, a general court-martial was appointed, the president of which was a regular officer, serving under a volunteer commission. This court was convened at the Presidio of San Francisco, and was presided over by Maj. James A. Hardie, a lieutenant of artillery in the regular establishment who was also serving as a major of the First New York Volunteer Infantry by appointment of the governor of the State of New York.

It is also interesting to note, as indicating that the status of volunteer troops under the ninety-seventh

article of war was receiving administrative consideration, that, at the outbreak of the war with Mexico, an opinion was rendered by Lieut. S. C. Ridgeley, the acting judge-advocate of the Army, in which it was said that a court for the trial of regular soldiers could not be composed in part of officers of the Arkansas volunteers. But this expression of opinion was not approved by the commanding general and was never applied in practice.

At the outbreak of the civil war, in 1861, large forces of volunteers were raised by the several States and accepted by the War Department in the operation of appropriate enactments of Congress.

Act of July 22, 1861 (12 Stat. L., 268).
Act of July 24, 1861 (12 Stat. L., 274, chaps. 16 and 17).
Act of July 29, 1861 (12 Stat. L., 279).
Act of August 3, 1861 (12 Stat. L., 287).
Act of August 5, 1861 (12 Stat. L., 314).
Act of July 17, 1862 (12 Stat. L., 597).

At an early stage of the war of the rebellion it became necessary to assign a status to the newly organized volunteer forces in matters relating to the administration of military justice. The case was presented to Judge-Advocate-General Joseph Holt, and the opinion rendered by him, which was adopted by the Secretary of War, governed the Department in respect to the composition of courts-martial for the trial of officers and enlisted men of the volunteers, so long as any of such forces remained in the military service.

The Judge-Advocate-General was of opinion that—

A court composed of regular officers can not try a volunteer officer, though a regular officer may be tried by a court of volunteers.

A mixed court composed of officers belonging to the Regular Army, to the volunteer service, and to the Invalid Corps would have authority to try regular officers only.

The Invalid Corps is regarded as a part of the volunteer service.

The words "militia officers" as employed in the ninety-seventh article of war have been interpreted since the commencement of the rebellion as synonymous, so far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished. (Record Book, Vol. V, p. 320.)

A court composed of regular officers can not try a volunteer officer, though a regular officer may be tried by a court of volunteers. A mixed court, therefore, composed of officers belonging to the Regular Army, to the volunteer service, and to the Invalid Corps (which is regarded as part of the latter) would have authority to try regular officers only. (Dig. Opins. J. A. G., 1865, p. 16.)

Drafted men or substitutes not belonging to the "regular forces" in the sense of this article are entitled to be tried by courts-martial composed entirely of "militia" officers, which term is held to embrace officers of the volunteer service. (*Ibid.*)

> Officers of the Veteran Reserve Corps can not be tried by a court-martial composed in whole or in part of officers of the Regular Army, this corps being regarded as a part of the volunteer force. So of officers of the United States colored troops. (*Id.*)

It was also held that regular officers and enlisted men could be tried by courts composed wholly or in part by officers or volunteers:

> A general court-martial has unquestionably the right to try regular soldiers, though all its members are officers in the volunteer service. (*Ibid.*)
>
> Volunteer officers may be associated with regular officers on courts-martial for the trial of regulars. (*Id.*)

But no such interpretation has been placed at any time upon the ninety-seventh article of war in its application to a case in which an officer, though holding a dormant regular commission, has been regularly inducted into the military service as an officer of volunteers, and *the practice and decisions of the Department have uniformly been that such an officer may lawfully sit as a member of a court for the trial of officers and enlisted men of the volunteer forces.*

A question having arisen as to whether an officer of the Regular Army having a volunteer commission could lawfully sit as a member of a court-martial for the trial of officers and enlisted men of the volunteer forces, the following expression of opinion was furnished by Judge-Advocate-General Holt on September 18, 1862:

> The fact that a part of the officers detailed for the court-martial, according to the rank they hold in the volunteer service, belong also, in subordinate capacities, to the Regular Army, does not, under the ninety-seventh article of war, invalidate the organization of the court. This has been the uniform decision of the War Department, and the practice of the service has been in accordance with it.
>
> The detail, however, of Lieutenant Williston as a member of the court presents an entirely different question. He is an officer of the Regular Army and holds no commission in the volunteer service. It can not be said that such a court-martial is, in the language of the law, composed entirely of militia officers. He does not cease to be a member of the court because he absented himself during the trial. He might before entering on the trial have been withdrawn and a volunteer officer substituted in his place by the authority appointing the court, and this would no doubt have cured the existing defect in its composition. His voluntary absence can have no such effect. A court thus constituted has no power to try an officer belonging to the volunteer service. (Record Book, Vol. I, pp. 466–67.)

Appended to the foregoing opinion is a note, in which it is said that:

> Upon a reconsideration of the question above discussed, the opinion is entertained that it may properly be held (and would be a preferable rule to adopt) that the mere designation of an officer of the Regular Army in the order

> containing the detail does not, in the sense of the article of war referred to, constitute him a member of the court which tries this case, he not having been sworn as such nor taking part in the trial as a component thereof. If, however, he should be sworn, and thus become a component member and enabled to exert an influence in the case by reason of his association with the other members, the proceedings would be invalidated. It is believed that the spirit of the ninety-seventh article of war would require this ruling, even though he should not actually participate in the trial.

It was again held by the same authority, in June, 1863, that—

> It has been uniformly held by this office that officers of the Regular Army can not sit upon the trial of officers of United States volunteers unless they also hold commissions in the volunteer service, in which case they can so sit. The term "militia officer," in the ninety-seventh article of war, is held to embrace officers of volunteers. (Record Book, Vol. II, p. 504.)

During the civil war a considerable number of officers of the Regular Army received volunteer commissions—some by appointment of the President, others by appointment of the governors of States. Some of these appointments were to the grade of general officer; others received State commissions as colonels or lieutenant-colonels of regiments of volunteers. While so serving their regular commissions were dormant and they performed none of the duties

assigned by law or regulations to their officers in the military establishment, from which, indeed, they were in fact detached during their incumbency of office in the volunteer forces. The status so existing was authorized and created by statute. The act of July 22, 1861, contained the requirement that—

> The President may select the major-generals and brigadier-generals provided for in this act from the line or staff of the Regular Army, and the officers so selected shall be permitted to retain their rank therein. (Sec. 4, act of July 22, 1861, 12 Stat. L., 268.)

The act of July 29, 1861, chapter 24, in making provision for the disbandment of the organizations which were added to the Regular Army for the period of the war, contained the requirement that—

> All of the officers of the Regular Army who have been or may be detached or assigned to duty for service in any other regiment or corps shall resume their positions in the Regular Army and shall be entitled to the same rank, promotion, and emoluments as if they had continued to serve in their own regiments or corps. (Sec. 7, act of July 29, 1861, 12 Stat. L., 279.)

In a subsequent section of the same enactment it was provided that—

> The enlistments for the regiments authorized by this act shall be in charge of the officers detailed for that purpose who are appointed to said regiments from civil life; and that in the meantime the officers appointed to the same from the Regular Army shall be detailed by the

> commanding general to such service in the volunteer regiments now in the field as will, in his judgment, give them the greatest military instruction and efficiency; and that the commanding general may, in his discretion, employ said officers with any part of the regular forces now in the field, until the regiments authorized by this act shall have been fully recruited, and detail any of the officers now in the Regular Army to service with the volunteer regiments now in the field, or which may hereafter be called out, with such rank as may be offered them in said volunteer regiments, for the purpose of imparting to them military instruction and efficiency.

In a general order issued by the War Department on August 15, 1862, it was provided that—

> Officers of the Regular Army will, as a general rule, receive leaves of absence to accept the rank of colonel in volunteer regiments, but not lower grades. Noncommissioned officers and privates will be discharged on receiving commissions in volunteer regiments. (General Orders, No. 107, War Department, August 15, 1862.)

At the outbreak of the war with Spain a considerable force of volunteer troops was authorized to be raised by Congress, and these troops were to be raised in part by the States and in part by the Government, acting through the instrumentalities of the War Department. Very complete provision was made for the appointment of regular officers to office in the volunteer forces so raised and organized, the act of

April 22, 1898 (30 Stats., 361), as amended by the act of May 28, 1898, providing that—

> The governor of any State or Territory may, with the consent of the President, appoint officers of the Regular Army in the grades of field officers in organizations of the Volunteer Army, and the President may appoint officers of the Regular Army in the grade of field officers in organizations of the volunteer army raised in the District of Columbia and the Indian Territory and in the regiments possessing special qualifications provided for in section six of an act of Congress approved April twenty-second, eighteen hundred and ninety-eight, and in section two of the act of Congress approved May eleventh, eighteen hundred and ninety-eight; and officers thus appointed shall be entitled to retain their rank in the Regular Army: *Provided*, That not more than one officer of the Regular Army shall hold a commission in any one regiment of the Volunteer Army at the same time: *And provided further*, That officers so appointed shall be entitled to receive only the pay and allowances of their rank in the volunteer organization. (Sec. 2, act of May 28, 1898, 30 Stat. L., 421.)

In the case at bar the officer, having been duly commissioned as an officer of a regiment of United States volunteers, is *prima facie* a volunteer officer, and as such is eligible to sit at the trial of an officer or enlisted man of the volunteer forces.

The language used in the statute is clear, and that used in the permissive enactments of 1861 and 1898,

hereinbefore cited, authorizing officers of the Army to accept appointments in the volunteer forces, is equally clear. If it were intended that regular officers, who held office in volunteer regiments, in the operation of express legislative sanction in that regard, were not to be vested with the same rights as other volunteer officers, or were to be forbidden to sit as members of courts-martial appointed to try officers and men of the volunteer establishment, language calculated to make that intention plain would have been used, if such was, in fact, the legislative intent, but no such language was used.

It must be assumed that Congress was familiar with the long-established administrative practice of the War Department in the execution of the ninety-seventh article of the code of 1806 and in the similar execution which was given to the sixty-fourth, seventy-seventh, and seventy-eighth articles of the code of 1878. In the absence of restrictive language we submit that the language used in the permissive act of May 28, 1898, should be given its ordinary meaning and that the officers serving in volunteer regiments should be regarded as having the same rights and privileges and as being charged with the same duties and obligations as other officers of the volunteer forces raised by Congress for the prosecution of the war with Spain.

In the case now before the court the officer who sat as a member of the court-martial held a volunteer commission, and therefore conformed to the requirements of the statute in that regard. He had been

selected by the President as one well qualified to hold the rank and perform the duties of a lieutenant-colonel in a regiment of volunteer infantry. He had held office for nearly six months at the time he was placed on court-martial duty, and should be presumed, after so much service with volunteer troops, to have been familiar with disciplinary needs of the volunteer forces.

The attention of the court is elsewhere drawn to the serious consequences that would ensue upon a reversal of the executive interpretation which was placed upon the ninety-seventh article of war over sixty years ago. During the war with Mexico it is seen to have been the practice to permit a regular officer holding a volunteer commission to sit as a member of a court for the trial of volunteers. At the outbreak of the civil war the question was fully and carefully reconsidered and the conclusion reached that, as volunteer troops were assimilated in their organzation and discipline to the militia forces, courts-martial for their trial should be composed of volunteer officers only. But it was also held, upon equal consideration, that one having a dormant regular commission, but who exercised the functions of military office in the volunteer forces into which he had been inducted by a lawful exercise of the appointing power was competent to take part in the trial of officers and enlisted men of the volunteers. Under the administrative practice which ensued upon the interpretation so placed by the Department on the ninety-seventh article of war great numbers of courts have

been appointed, acquittals have been reached, convictions have been had, sentences have been imposed and executed, benefits and emoluments growing out of subsequent enactments of Congress have accrued, and the obligations so created have been satisfied.

DEPARTMENTAL CONSTRUCTION.

The courts have always attached great weight and shown great respect for the construction placed upon a statute by the Department from which the statute doubtless emanated in the first instance and which is charged with the interpretation and execution of the same.

In this case there has been long-continued departmental construction of the statute in question, and under it the rights of a large number of officers who have been tried by courts-martial similarly constituted have been determined, and it is submitted that the construction placed upon this statute by the War Department, continuing as it has for a period of nearly half a century, has acquired the force of law, and this construction should not be lightly overturned by the court unless the strongest and most cogent reasons are shown therefor.

Rogers v. *Goodwin*, 2 Mass., 476.
Brown v. *United States*, 113 U. S., 568–571.
Edwards v. *Darby*, 12 Wheat., 206.
United States v. *Hill*, 120 U. S., 169, 182.
United States v. *Philbrick*, 120 U. S., 52–59.
United States v. *Johnson*, 124 U. S., 237.
Robertson v. *Downing*, 127 U. S., 607–613.

In the last-mentioned case the court, speaking through Mr. Justice Field, said:

> Where there has been a long acquiescence in a departmental regulation, and by it the rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most active and persuasive reasons.

The respect in which the doctrine of contemporaneous construction by a Department charged with the execution of a law has long been held by the court, together with the reasons for the same, find expression in two recently decided cases, *Midway Company* v. *Eaton* (183 U. S., 609), and *United States* v. *Finnell* (185 U. S., 236, 243–244).

In the former case the court, speaking through Mr. Justice McKenna, said:

> It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning.
>
> One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words; at any rate, were familiar with the circumstances which induced the legislation.

Likewise in the *Finnell case* (*supra*), the court further emphasizes the principle here contended for and follows the departmental construction of a statute,

wherein the court, speaking through Mr. Justice Harlan, says:

> These views are justified by long practice in the Department, and upon that we may properly rest our affirmance of the judgment of the Court of Claims. * * * It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by the accounting officers for many years should be overthrown, we apprehend that much confusion might arise. Of course if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge (citing cases). But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the Department charged with the execution of the statute should be respected, and not overruled except for cogent reasons (citing cases). Congress can enact such legislation as may be necessary to change the existing practice if it deems that course conducive to the public interests.

As indicated by the learned justice who delivered the opinion in the latter case, so in the present case, and with even greater force, "much confusion would arise" and thousands of cases would be involved by the overturning of the unbroken construction of the

accounting officers; and, as also suggested in said opinion, "Congress can enact such legislation as may be necessary to change the existing practice if it deems that course conducive to the public interests."

This construction of the statute in question by the Departments charged with its execution, not only contemporaneous with the enactment of the statute itself, but unbroken and uninterrupted as it has been, has also been sanctioned by long acquiescence on the part of the Legislature and practically so by the judicial tribunals. Is not this the strongest evidence that said statute has been rightly construed and interpreted? It has been held by numerous decisions of the courts that a construction under such circumstances becomes established law. (*Hahn* v. *United States*, 107 U. S., pp. 402–406; *United States* v. *Pugh*, 99 U. S., 265; *Edwards* v. *Darby*, 12 Wheat., 210. See also *United States* v. *Alexander*, 12 Wall., 177; *Peabody* v. *Stark*, 16 id., 240; *Smythe* v. *Fisk*, 23 id., 374; *United States* v. *Moon*, 95 U. S., 760.)

The court in the latter case, in its opinion, delivered by Mr. Justice Swayne, said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *MacDaniel*, 7 id., 1.) The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the

> laws they are afterwards called upon to interpret. * * * A thing may be within the letter of the statute and not within its meaning; and it may be within the meaning although not within the letter. (Citing cases.)

In a still later case, that of the *United States* v. *Sweet* (189 U. S., 471), the court holds, speaking through Mr. Justice Holmes, that—

> The weight of a contemporaneous and long-continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. (Citing *United States* v. *Johnston*, 124 U. S., 236, 253; *United States* v. *Finnell*, 185 U. S., 236, 244.)

If the decision of the Court of Claims is permitted to stand, it will invalidate a vast number of sentences imposed by courts-martial similarly constituted, during both the civil war and the war with Spain, thus involving the unsettling of matters of the most far-reaching importance, which up to this time have been regarded by the Government and all parties concerned as fully and finally adjudicated and settled. It will be productive of unspeakable confusion and chaos, and serve no good purpose.

IV.

(Second point.)

DID THE COURT HAVE JURISDICTION TO RECONSIDER AND REVERSE ITS FORMER FINDINGS?

The appellee insists, and this is his main contention, that under the fifth amendment of the Constitution, and also under the one hundred and second article

of war, the court-martial was without jurisdiction to reconsider its finding of not guilty, and that a sentence based upon reconsideration of said finding is illegal and utterly void.

In the consideration of this subject it must be constantly kept in mind that trials of this character differ in many essential particulars from trials in civil or criminal courts. Courts-martial exist and have their jurisdiction by virtue of *military* law, the court being constituted and empowered to act in each instance *by authority from a commanding officer* (Bouvier). Decisions of courts-martial are unquestionably subject to revision by the commanding officer, the officer ordering the court, or by the President or sovereign, as the case may be. (11 Johns N. Y., 150; also all military text-books.) Both in the organization of the court and in the right of revision this court differs very radically from the civil court. It is convened solely by authority of the commanding officer or the commander in chief of the Army. He alone is empowered to convene it, and he alone, or the President, or the sovereign, may revise its findings. Keeping in mind, then, this power of revision which vests in the commanding officer who calls the court into existence and may supervise its action, and recollecting that the approval of such commanding officer is a prerequisite to the validity of the sentence (Winthrop, 686), and that by article 112 he is invested with sole discretion and authority and that he is to act upon his best judgment in the light of the facts and the law (Winthrop, 687), and

that this authority is not affected by the absence of the accused, thus differing in a very essential respect from the practice and procedure of the civil courts, which includes those of criminal jurisdiction, and also keeping in mind that he can approve or disapprove, in whole or in part, and that his disapproval is tantamount to an acquittal by the court (13 Opinions Attorney-General, 460), it is seen that very wide discretion is lodged in the commanding officer ordering and convening the court. It is erroneous to assume that the trial of the accused officer was concluded after the testimony had been taken and a finding of not guilty made and certified to the commanding officer. This would undoubtedly be true were it not for the fact that this revisionary power rested with and remained in the commanding officer, and until he had exercised that power, either by confirming and approving the sentence of the court-martial or in its disaffirmance or disapproval, a trial had not taken place. In other words, action by the commanding officer was a part of the proceedings which constituted the trial of the accused, and undoubtedly an indispensable accompaniment to the same.

Thus in the cases of *Brodie*, *Coffey*, *Hanshew*, and *Morris* (128 Fed. Rep., 665) the United States Circuit Court of Appeals, in delivering its opinion through Van Devanter, judge, says:

> While a court-martial can not be altogether likened unto a civil court in which the guilt of the accused is to be pronounced by a jury, under the supervision of a judge, and the penalty

is to be fixed by the judge within the prescribed limits, it is yet true that a court-martial acts only in response to the call of a superior authority and that the result of its deliberations is somewhat in the nature of a recommendation to that authority (1 Winthrop Mil. Law, 632; Davis Mil. Law, 15) is without effect unless approved by it, and until then is interlocutory and inchoate only. (*Runkle* v. *United States*, 122 U. S., 543, 555; *Mills* v. *Martin*, 19 Johns, 7, 30.) The superior authority which orders a court-martial, and to which its conclusion must be submitted for approval or disapproval, is spoken of as the reviewing authority. Its action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal, and is not entirely a court of errors.

Whatever the finding of the court, an officer or enlisted man in arrest or confinement is not released from arrest or confinement until the reviewing or convening authority has acted on the case and authorized the release.

In the exercise of the authority lodged in him, the commanding officer, upon the receipt by him of the first finding of the court-martial, ordered the same to be returned for reconsideration, with the indorsement thereon: "The evidence in this case is conclusive as to the guilt of the accused. Four witnesses testify that they saw him gambling with enlisted men, while two witnesses, whose memory is faulty, testify negatively. The accused denies

the allegation. It is recommended that the proceedings be returned to the court for a reconsideration of its finding."

This action on the part of the commanding officer was in entire accord with paragraph 957 of the Army Regulations, which provides as follows:

> When the record of a court exhibits error in preparation or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a reconsideration of its action, pointing out defects. Should the court concur in the views submitted, it will proceed by amendment to correct its errors, *and may modify or completely change its findings.* A reopening of the case by calling or recalling witnesses is illegal.

Here there was no reopening of the case by calling or recalling witnesses. There was simply a reconsideration.

Learned counsel for appellee in his brief in the Court of Claims (p. 66), after stating that he has examined a long list of authorities upon military law, naming them, adds:

> There is nothing in any of these works to sustain the contention that a court-martial may, on being reconvened, lawfully revoke or reconsider an acquittal, or that it may be reconvened for such purpose, except a footnote in Winchell at page 696.

Painstaking examination has been made of the authorities referred to by opposing counsel, and it is as confidently stated that with the possible excep-

tion of O'Brien, who himself states later that he submits his views with much diffidence, being aware that there is much difference of opinion, there is nothing in any of these works to sustain the contention that a court-martial *may not*, on being reconvened, lawfully revoke or reconsider an acquittal, or that it *may not* be reconvened for such purpose.

All the authorities acknowledge the right of revision which rests with the commanding officer, and that he may or may not return the record to the court-martial for reconsideration, though not for retrial, by the recall either of old witnesses or of new ones.

Having in mind the fact that the first finding of the court-martial was not rendered in the presence of the accused, but was in fact rendered in his absence and without his knowledge of the same, and that afterwards his only knowledge of such fact was communicated to him by the record itself, which record showed that after revision and reconsideration, when the court had finally concluded its labors, he was adjudged to be guilty and sentence of dismissal was ordered thereupon, it becomes more apparent how that in these proceedings there was no complete trial in the first instance, and hence there could be no former jeopardy, inasmuch as the trial properly embraced and included the definite and final action of the commanding officer. Thus Griffith says (p. 90): "The revision of the sentence is the last act in the trial which a court-martial may be called upon to perform," recognizing by this language that it is a part of the trial or an act in a trial.

The law as it exists at the present time is correctly and comprehensively stated in Winthrop (p. 696), wherein he says:

> The court on revision may so far change the finding as to substitute a conviction for an acquittal, adding thereupon a sentence, citing Griffith, 92; also G. O. 6, Dept. of Va. and N. C., 1864; G. O. 13, Dept. of Va., 1866.

The case above cited upon examination is seen to be analogous to the present case. In that case, as in this, the court, after finding the accused not guilty of the charges, was subsequently reconvened upon order of the Duke of Wellington, obeying the commands of His Majesty, to revise its former sentence, together with the grounds on which these commands were given, whereupon the court reversed its former opinion and found the prisoner guilty of all the charges. While it is true that O'Brien says "the sentence is not properly any part of the trial," and would seem to take a somewhat technical view in favor of the rights of the accused, yet he qualifies his statement by adding:

> These views on this point the author submits with much diffidence, being aware that on the abstract question of right there is much difference of opinion.
>
> It is to be regretted that the custom of war is so obscure as to cause these doubts, nor are they removed by a reference to works on military law. (Pp. 278 and 279, ed. 1846.)

Although this doubt seemingly existed in the minds of writers upon military law at the time in which

O'Brien wrote, nevertheless the consensus of later authoritative views is adverse to the opinion expressed by O'Brien. This has found expression in paragraph 957 of the Army Regulations of 1895 (corresponding to 901 of 1904) and in Benét (supra).

In the case of *Gratiot* v. *United States* (4 How., 118) it was held that as to the Army Regulations:

> This court has too repeatedly said that they have the force of law to make it proper to discuss that point anew, and such of them as were assailed in the case by counsel as not warranted by law the court think are as obligatory as any of the rest.

The power of revision and modification implies the power of reversal.

In the nature of things there could not be a trial or an acquittal without appropriate action by the officer who convened the court and whose ultimate duty it was to render final action in the premises. That there was no dissolution of this court, although after the first hearing there was an adjournment *sine die*, is beyond question, for the authorities are too numerous to be here enumerated, which hold that the court is in session until dissolved by order of the officer which convenes it. It follows, also, that if the court has been dissolved by order of the reviewing officer it can not be reconvened, but if not it is still a legal court. (Ives, 190.) Therefore, to constitute a trial the court must in the first instance have jurisdiction, in the second instance must exercise it, in the third must have finished its labors, and in the fourth its findings

must have been acted upon by the reviewing authority and the final action published. The two latter inseparables to a completed trial were absent until the court reconvened and reconsidered, and, its labors being finished, the commanding officer approved the same.

It will not do to treat the reconsideration of the evidence by the court-martial, under direction of the revisionary officer, as a second trial, for the reason that it was in fact not only a part, but an inseparable accompaniment, of the first and only trial. If it is kept in mind that there was no dissolution of the court until the commanding officer convening it dissolved it, and that the sentence is not final and does not become valid unless, except, and until it receives the approval of the sovereign or the commanding officer to whom the power has been delegated, a different view is imparted to the subject under consideration.

All the authorities on military law of any repute hold that when the punishment is inadequate reversal may be necessary (De Hart, 205), and this being true, the inevitable inference is that, when no punishment at all has been found or fixed, that in that case reversal becomes all the more necessary.

Thus a court-martial on revision is competent to amend *any defect* resulting from its own decision not connected with questions of legality or procedure. (De Hart, 205–207–212.) An attempt has been made to apply the rule in civil courts as to the conclusiveness of a verdict of not guilty and amendment of ver-

dict to the proceedings of a court-martial, which court is upon an entirely different footing, both in its organization, its jurisdiction, and its procedure. One essential distinction, as pointed out by Clode in his Military and Martial Law (p. 156), between the finding of a court-martial and the verdict of a jury is this: In one case it is essentially a secret proceeding, and the result not made known to the prisoner *until confirmed by the convening officer;* in the other, *its validity depends upon its publicity.*

In his quotation from the last-mentioned author (Clode, pp. 57–68, claimant's brief) learned counsel does not furnish the full quotation, which sheds a different light upon the matter. It is herewith appended in full:

> Having found a sentence and awarded a punishment, either in the first instance *or on revision by direction from the convening officer,* the functions of the court are terminated by the transmission of the proceedings to him.

It is very plain, therefore, that the functions of the court are not fully or finally terminated in the case of revision until after the revision has been completed, and Winthrop says (p. 68): "The word 'trial' in article 102 is to be interpreted as meaning *duly prosecuted* before a court-martial to a legal conviction or acquittal."

Here there was no legal acquittal, and hence the rule of *atrefois acquit* is not applicable.

Harwood impliedly holds to the interpretation here contended for, for he says (p. 144):

> The authority who ordered the court is competent to direct it to reconsider its proceeding for the purpose of correcting any mistake they have made in applying the evidence to the facts in issue.

This was just what was done in this case—no more, no less. Here there was no legal acquittal, nor could there have been until the verdict of the court-martial was passed on by the commanding officer, which as stated before, was indispensable.

Does not the power to revise imply the power to reverse? If the sentence is inadequate, may it not be made adequate?

The case of *ex parte Reed* (100 U. S., 13) is decisive of the present controversy. In that case, after a court-martial had found the accused guilty of certain charges and sentence was passed upon him and transmitted with the record to the revising officer, said officer returned it to said court-martial with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence; whereupon the court proceeded to revise it, and, after revoking it, substituted another, which he approved, inflicting upon Reed a severer punishment. Reed, who was imprisoned pursuant thereto, alleging that it was illegal and void and that he was thereby illegally deprived of his liberty, prayed for a writ of *habeas*

corpus, and it was held that the court-martial had jurisdiction of the person and of the subject-matter, and was competent to pass the sentence whereof Reed complained. (From syllabus.)

In that case the court also held, speaking by Mr. Justice Swayne (p. 22):

> It is clear that the court was not dissolved until after the approval of the second sentence by the admiral.

Were further authorities necessary to enforce the position of the defendant, the case of *Swaim* v. *United States* (C. Cls. R., 28, 173; 165 U. S., 553) supplies the same. In that case this court, speaking through Mr. Chief Justice Nott, says:

> When a person enters the military service, whether as an officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights. He also submits himself to the administration of justice by military tribunals, whose power extends to fines and forfeitures, to the deprivation of rank and pay, to imprisonment, and even to punishment by death.

It will be noticed that the court emphasizes the essential difference between the status and rights of a person in the military service and those of a person in civil life.

Later, in said opinion, the learned Chief Justice, while denying that authority existed in the reviewing

officer to *require* the court to do that which he could not himself do—increase the severity of a sentence—states as follows:

> The question presented by the case is believed to be a new one, unless it be identical in legal effect with that which was before the Supreme Court in *Ex parte Reed* (100 U. S. R., 13). In that case there was an unequivocal offense involving no discretion on the part of the court, viz, malfeasance in the discharge of his official duty. In this case it was necessarily within the discretion of the court-martial to determine whether the acts constituted an offense, and if so, its gravity, seriousness, and degree. In both cases the punishment was within the discretion of the court. In both cases the reviewing officer disapproved the leniency of the sentence, and in both cases the court-martial complied with his recommendation and imposed a severer punishment. On the one hand it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand, it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient, in effect compelled the court to impose a more severe one;

> that in military life a superior officer is conceded to be invested with superior wisdom, and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively invested by law.
>
> But while the principle is a sound one, which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in *Ex parte Reed* is conclusive upon this branch of the case.

The Supreme Court, in affirming the decision of this court in the last-mentioned case, hold as follows (syllabus):

> When a court-martial has jurisdiction of the person of the accused and of the offense charged and acts within the scope of its lawful powers, its proceedings and sentence can not be set aside by the civil courts. The action of the President in twice returning the proceedings of the court-martial, *urging a more severe sentence*, was authorized by law; and a sentence made after such action and in consequence of it was valid.

The latter court, speaking through Mr. Justice Shiras, said, referring to the case of *Ex parte Reed* (*supra*):

> This court held that such a regulation [referring to the Navy] had the force of law, but as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any immediate error or irregularity committed within the sphere of

> its authority; that the second sentence was not void; and accordingly the application for a writ of habeas corpus was denied. We agree with the Court of Claims that the ruling in *Ex parte Reed*, in principle decides the present question.

Attempt has been made to differentiate between increasing the severity of the punishment upon reconsideration by the court-martial and substituting *some* punishment for *no* punishment, but obviously such effort must fail.

The reasoning of the court, in the case of *Ex parte Reed* (*supra*) and *Swaim* v. *United States* (*supra*), carried to its logical conclusion, warrants the court in declaring that if a court-martial may, on reconsideration, *increase the measure* of punishment, they may also, upon reconsideration of their findings, substitute *some* punishment for *no* punishment.

Perhaps the position of the appellant can be no better stated than in the language of Mr. Justice Bradley, in delivering the opinion of the Supreme Court of the District of Columbia, in dismissing mandamus proceedings brought in that court by the claimant herein (28 Washington Law Reporter, 787):

> If the first finding of not guilty, and the judgment of acquittal had been allowed to stand, and the same charge had been submitted for trial to another court, there would appear to be no question that the former acquittal would have been a perfect defense. But that was not the case. The court was summoned by the order of the general com-

manding to consider such cases as should be presented to it for trial. That order called it into being. But for that order the members composing it were without power to assemble or to act as a court. They were equally without power to terminate their judicial functions. The court could not dissolve itself. The same power that created it must determine its existence. When it adjourned *sine die* after the acquittal of the relator, that act was no more in effect than a simple adjournment. It was still a duly organized and constituted body, subject to orders, and in duty bound to consider such matters as should be properly submitted to it. It had the power, of its own motion, before its verdict was forwarded to the reviewing authority, and possibly after it was forwarded, but before it had been approved and recorded, to reconsider its action. Why did not the power to reconsider exist upon the failure of the commanding general to approve, and upon his recommittal to it for reconsideration? That authority to recommit, and the duty to reconsider, are to be found in Army Regulations, 1900, section 957.

* * * * *

The court is not allowed to hear further testimony; it reopens the case only for further deliberation upon the views submitted to it by the reviewing authority. It is not obliged to concur in those views. Its right is to adhere to its original conclusions, and its power and right to "completely change its findings."

In a criminal case in a common-law court the jury, having returned their verdict, have

the power to amend and change it before it is recorded and before they are discharged. (1 Bishop Crim. Proc., sec. 1003, and cases cited.)

Nor can there be any good reason why the court, when the jury have delivered a manifestly improper verdict, should not suggest to them, before it has been recorded and before they have been discharged, that they reconsider their verdict, or why the jury, if they see proper to reconsider it, may not change it and render a different verdict. (*Ford* v. *State*, 12 Md., 546; *Burk* v. *Commw.*, 5 J. J. Mar., 675.)

In the case of the relator the Army regulation cited prescribed the powers and duties of the reviewing officer and of the court in the premises, and the proceedings appear to have been in conformity with its provisions. These regulations have the force of law. (*Gratiot* v. *United States*, 4 How., 80, 117; *Ex parte Reed*, 100 U. S., 13; *Swaim* v. *United States*, 165 U.S., 553, 565.)

In the case of Reed it was claimed that he had been twice put in jeopardy for the same offense, because, having been tried and sentenced by a court-martial, the record was returned to the court by the reviewing officer with the suggestion that the sentence was inadequate, and thereupon the court changed the sentence and made it more severe. In the case of Swaim it was claimed that the sentence of a court-martial of which he complained was void. It was the second review of an original sentence which was made more severe with each reconsideration. Reed's case was a petition for a

writ of *habeas corpus*. Swaim's case was a claim prosecuted in the Court of Claims for pay and allowances of which he alleged he had been deprived by reason of such void sentence. Reed was tried by a naval general court-martial, and the reconsideration of the sentence was pursuant to a Navy regulation that was substantially the same as the Army regulation cited above. Swaim was tried by a military court-martial; and the reviews of his sentence were made under an Army regulation then in force, almost identical in language with the present regulation No. 957. In each case it was held that the regulation warranted the course pursued.

The proceedings in the case of the relator appear to have been in accordance with law, and he has been effectually out of the volunteer service of the United States since February 17, 1899.

On appeal from the decision of the Supreme Court of the District of Columbia to the Court of Appeals, the latter court affirmed the judgment of the court below without venturing an opinion with respect to the validity of the proceedings of the court-martial. (18 App. Cas., D. C., 239.)

V.

(Third point.)

WAS THE COURT RECONVENED IN ACCORDANCE WITH LAW?

Was paragraph 957 of the Army Regulations of 1895, then in force, disregarded?

Said paragraph, as previously quoted, provides, among other things, then when the record of a court exhibits error in preparation or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a consideration of its action, *pointing out defects.*

Appellee's counsel has fallen into error with relation to the facts in this matter. The record (p. 10) shows that the order of the commanding general, of date December 1, 1898, had an indorsement on the back thereof, which was, in fact, a part of the same, which fully complied with the requirements of section 957. Said order reads as follows:

> HEADQUARTERS DEPARTMENT OF SANTIAGO,
> OFFICE OF JUDGE-ADVOCATE,
> *December 1, 1898.*
>
> Respectfully returned to the Adjutant-General of the Department.
>
> The evidence in this case is conclusive as to the guilt of the accused. Four witnesses testify that they saw him gambling with enlisted men, while two witnesses, whose memories are faulty, testify negatively. The accused denies the allegation. It is recommended that the proceedings be returned to the court for reconsideration of its findings.
>
> H. R. BAILEY,
> *Captain, Fifth Infantry, Acting Judge-Advocate.*

Further comment upon this matter is deemed unnecessary, inasmuch as the court was unquestionably reconvened in all respects in accordance with law.

VI.

(Fourth point.)

WAS THE PRESIDENT'S FORMAL APPROVAL OF THE SENTENCE OF THE COURT-MARTIAL ESSENTIAL TO ITS VALIDITY?

The inquiry is raised whether or not the sentence of the court-martial is legal and binding upon the accused by reason of the fact that the same was not formally approved by the President of the United States and whether this was not in violation of the one hundred and sixth article of war, which provides as follows:

> In time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President.

It will be observed that, subsequent to the sentence of the court-martial and its approval by the commanding general, and upon the transmittal of the same to the President, the same, on January 12, 1899, was returned to the commanding general by the Judge-Advocate-General, inviting his attention to the fact that "the one hundred and sixth article of war only relates to 'time of peace,' and that the state of war still continues." (Rec., 22.)

While it is true that there had been a suspension of actual hostilities prior to that time, and that the treaty of peace had been signed by the commissioners appointed by the two warring countries, nevertheless it was not until April 11, 1899, that ratifications of said treaty of peace were exchanged between the

United States Government and the Kingdom of Spain, and it is respectfully submitted as a matter of law, concerning which there can not be any reasonable question, that until said exchange of ratifications had been effected the status of war continued and the "time of peace" had not actually begun.

Cross et al. v. *Harrison*, 16 How., 164.
De Lima v. *Bidwell*, 182 U. S., p. 1.
Dooley v. *United States*, 182 U. S., 222.
Downs v. *Bidwell*, 122 U. S., 244.
J. Ribas y Hijo v. *United States*, 194 U. S., 323.

In the latter case the Supreme Court, speaking through Mr. Justice Harlan (p. 323), says:

> A state of war did not, in law, cease until the ratification in April, 1899, of the treaty of peace.

VII.

(Fifth point.) (Raised by cross appeal.)

WAS COMPANY I, OF THE NINTH UNITED STATES VOLUNTEER INFANTRY, AND ALL THE OFFICERS, NONCOMMISSIONED OFFICERS, AND ENLISTED MEN MUSTERED OUT MAY 25, 1899; AND IF NOT DISCHARGED BY VIRTUE OF THE SENTENCE OF THE COURT-MARTIAL ON FEBRUARY 17, 1899, WAS NOT BROWN MUSTERED OUT WITH HIS MILITARY COMPANY? IN OTHER WORDS, BY OPERATION OF LAW?

The Court of Claims has answered the above inquiry in the affirmative in its findings of fact and conclusions of law thereon. (R., pp. 9, 10.) It is with the conclusions of law, based on the findings of fact, that appellee complains and maintains that the Court of Claims erred.

The appellee asserts that "all the officers * * *" of Company I (his company) were not mustered out May 25, 1899; inasmuch as he contends that he was still an officer of said company and that he was not mustered out with his company because he had petitioned for this privilege to the Secretary of War and it had been denied. Hence, he claims that he was an officer in the service of the United States up to the time of the ultimate disbandment of the Volunteer Army.

A review of the legislation and regulations under which the various organizations comprising the volunteer forces of the United States called into existence through the exigencies of the Spanish-American war and the subsequent insurrection in the Philippine Archipelago is convincing of the termination of the service of the appellee's company—his fellow-officers and the enlisted men and his own muster out with his said organization, providing the court-martial proceedings were invalid.

The Ninth United States Volunteer Infantry was organized under the act of May 11, 1898 (30 Stats., 405), which stated that the President was empowered during the war to organize ten regiments of volunteer infantry under the act of April 22, 1898.

The act of April 22, 1898 (30 Stats., 361, sec. 4), stated that "all enlistments for the Volunteer Army shall be for two years, unless sooner terminated; and that all officers and men composing said army shall be discharged from the service of the United

States when the purposes for which they were called into the service shall have been accomplished, or on the conclusion of hostilities."

By the act of March 2, 1899 (30 Stats., 981, sec. 15), Congress put an end to the volunteer force, of which the Ninth United States Volunteer Infantry was a part, by providing that "the officers and men of the Volunteer Army shall be mustered out," etc.

The appellee, therefore, could not be in the service at any time after the volunteer forces, of which he was a commissioned officer, ceased to exist. (Digest of Opinions of Judge-Advocate-General, 1757.)

Under no circumstances could his office remain in existence and the appellee be allowed to hold it after the branch of the Army to which he was attached had ceased its existence. This conclusion is so plain that further argument would seem to be unnecessary.

The muster out of the Ninth United States Volunteer Infantry was governed by the act of January 12, 1899 (30 Stats., 784), and G. O. 13, A. G. O., 1899, which contains the regulations for carrying the act into effect.

The act provides that "as far as practicable" the discharge of the officers and men of volunteer forces shall take effect on the date of the muster out of the organization to which they belong.

G. O. 13, A. G. O., 1899, *supra*, makes one exception in the case of officers and men "retained in the service by special authority of the War Department."

To be "retained" in the service an officer or enlisted man must be held under military control and discipline by competent authority. (Dig. Op. J. A. G., 1758.)

There is nothing in the record to show that the claimant was "retained" in the service by special authority of the War Department subsequent to May 25, 1899. Statement was made by appellee in the Court of Claims that the War Department "possesses exclusively the power to discharge the claimant." This view is unquestionably erroneous, inasmuch as *this power resides primarily in Congress*, and no notice is necessary, although it is generally the practice to give it. (See Dig. Op. J. A. G., 1760.)

It further follows that when Congress provided that the force of which the appellee was an officer should cease to exist, the appellee's connection with that force also ceased to exist, and his connection with the Army of the United States ceased to exist, and it was beyond the power of the Executive to continue him in the service after the muster out of such force.

The point raised by appellee, that because the War Department omitted and refused to formally muster the claimant out and discharge him upon application made to said Department subsequent to the proceedings of the court-martial, and that, he being entitled to a discharge and not receiving the same, the Government is estopped by its own act and refusal to issue said discharge from denying

his connection with the military forces even after the dissolution of the military organization with which he was connected, is without force or vitality.

Section 282, Revised Statutes, and the act of July 1, 1902, chapter 1353 (32 Stat. L., 629), have been cited to show the right of an officer to evidence of honorable discharge from the military service of the United States. Section 282 simply provides that where an officer or enlisted man of the Army finds it necessary to file his evidence of honorable discharge from the military service of the United States to secure the settlement of his accounts, the accounting officer with whom it has been filed shall, upon application by said officer or enlisted man, deliver to him such evidence of honorable discharge; or, in other words, it provides that where the officer or enlisted man has temporarily parted with the evidence of his honorable discharge for the purpose of securing the settlement of his accounts he shall be entitled to the return of the same again; and the act of July 1, 1902, provides that where any officer or enlisted man who has or shall hereafter be honorably discharged from the military service of the United States has lost his certificate of discharge or the same has been destroyed without his privity or procurement, the Secretary of War shall be authorized to furnish to such officer or enlisted man a certificate of such discharge, properly marked, so as to be known as a certificate in lieu of the lost or destroyed document, thus indicating that where an honorable dis-

charge has once been issued and the same has been either filed with the Department or lost or destroyed by the party to whom the same has issued, the same shall be returned in the first instance, or a new certificate in lieu of the old one shall be issued to said party upon satisfactory proof being furnished to the War Department.

But should we concede the right of the appellee to a certificate of honorable discharge which he did not obtain on application to the Secretary of War therefor, in that event the fact that the officer was entitled to an honorable discharge upon application to the War Department, and that said honorable discharge was refused by the War Department, would not *ipso facto* be conclusive of the officer's retention in the military service of the United States. In other words, the failure of the Department to furnish the officer with an honorable discharge upon application, because said Department believed at the time of its said refusal that the officer had already been dishonorably discharged by the sentence of the court-martial on a previous day, is, to say the least, but a shadowy pretext for the retention of the officer in the military service after the dissolution of the organization with which the officer was connected.

The whole question, therefore, irresistibly reverts, as before stated, to whether the officer was or was not mustered out of the service of the United States at the time of the muster out of his military organization, providing, of course, the officer was not discharged by

virtue of the sentence of the court-martial. As to this question, as previously suggested, under the authorities there can be little controversy. "He was not retained in service by special authority of the War Department." Neither was he, as a matter of fact, at any time subsequent to the sentence of the court-martial "under military control and discipline by competent authority," and certainly, subsequent to May 25, at any rate, was not in any way connected with the Army of the United States.

VIII.

(Sixth point. Raised by cross appeal.)

IF NOT DISCHARGED BY VIRTUE OF SENTENCE OF COURT-MARTIAL ON FEBRUARY 17, 1899, IS APPELLEE ENTITLED TO ONE MONTH EXTRA PAY UNDER AND BY VIRTUE OF THE ACT OF JANUARY 12, 1899, AS AMENDED BY THE ACT OF MAY, 26, 1900?

The Court of Claims has already, in its judgment, based on a conclusion of law which is believed to be erroneous, allowed the appellee two months' extra pay on account of honest and faithful service "beyond the limits of the United States." The appellee now claims that in addition thereto he is entitled to one month's extra pay (additional) on account of having "served honestly and faithfully within the limits of the United States."

A careful reading of the two acts above mentioned (chap. 46, 30 Stats., p. 784, and chap. 586, 31 Stats., p. 217) will convince the court that the benefits of said provisions are alternative and not cumulative.

The Court of Claims has in no instance allowed three months' extra pay to any officer or any soldier who served during the Spanish-American war, both within and without the limits of the United States.

In conclusion, it is submitted that the caustic criticism of the record in this case by the late chief justice of the Court of Claims is not warranted by a careful examination of the same. Particularly is this true in the light of the language of the same jurist in the case of *Swaim* v. *The United States* (28 C. Cls. R., 173), wherein, delivering the opinion of the court, he said:

> When a person enters the military service, whether as an officer or a private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights.

In this case there was no departure from the strict requirements of military procedure, and the decision of the Court of Claims should therefore be reversed.

Respectfully submitted.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.
GEORGE B. DAVIS,
Judge-Advocate-General U. S. Army.
FRANKLIN W. COLLINS,
Special Attorney.

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